BAPE Presentation
Timiskaming First Nation
May 2003

I have come here today to on behalf of the *Saugeen Anishnabeg* – the People at the Head of the Lake. This is how we, the people of Timiskaming First Nation have referred to ourselves since time immemorial. At the outset I'd like to state that our community has a great deal of concern over the proposed Angliers project. We also have great concerns about the Quebec government's desire to increase hydro development on our waterways.

But having said this, we must also state that this hearing will do little to address our concerns. While we appreciate the fact that BAPE has responded to our request for a hearing, we are most disappointed that we have been left without the ability to properly participate in this process. We also must state for the record that a public session does not fulfil the obligation to consult with First Nation people to address our concerns.

We state for the record that our community does not have the technical or financial resources to ensure that the environment and our rights and interests will not be negatively impacted. And since your Commission, along with the proponent and the Quebec government, has refused to provide our people with any technical documents in the written language of our community, you have effectively ensured that any comments we make will be superficial and lacking in a necessary critique of the proponent's claims.

In light of the concerns within our community over breaches in the fiduciary and legal obligations of the governments of Quebec and Canada, I will limit my comments to issues of Aboriginal rights, title and the criteria – as laid out in case law – by which the Crown must conduct itself.

In the case of the Angliers project the government's deficiency can be summarized as follows:

1) Failure on the part of the Crown to consider the project's potential impacts on the Aboriginal and Treaty rights of the affected First Nations - rights which are protected by s. 35 of the *Constitution Act, 1982*.

2) Failure on the part of the the Crown to engage in consultations regarding potential infringements of Aboriginal and Treaty rights.

3) Failure on the part of the Crown to provide our community with resources to be able accurately assess and respond to the risks of this project. There is a clear conflict of interest in expecting us to rely on documents which have been prepared for the benefit of the proponent.

4) The failure to provide our community with information in English, which is the working language of our community, is a clear breach of fiduciary obligations to ensure that we are able to fully represent our interests in this matter.

5) The clear conflict of interest wherein the government acts as both the arbiter of our concerns and as a partner with the proponent to promote new hydro development projects.

In light of this, I will limit my comments here today to an outline of our legal interests in this land and your legal responsibilities to protect our fiduciary and Aboriginal rights.

Timiskaming First Nation exerts unextinguished title to our traditional territory. We also exercise rights protected by S. 35 of the Constitution. That being said, as case law (the Taku River decision) has shown, it is not up to us prove our prior right to these lands before being owed an obligation by the Crown to protect those interests.

It is not an issue of whether Timiskaming First Nation can prove that there are unresolved environmental issues relating to the Anglicrs project. The issue is, in fact, whether or not the government of Quebec has ensured that our Aboriginal rights, as laid out in section 35 of the Constitution Act, 1982 have been respected.

The bar of obligation for the government has been raised by the fact that the Crown is acting as both the arbiter in this process and as promoter of new hydro developments in the province. Therefore, the Crown finds itself in a clear conflict if it has not taken the time and resources to ensure that First Nation interests have been protected.

Supreme Court Case Law
There have been a number of court decisions made in recent years relating to obligations of the Crown to protect Aboriginal rights when the issue of infringement on Aboriginal Title has been raised.
[...]

In the Supreme Court Delgamuukw decision, the court concluded that where Aboriginal title exists, the Crown must justify its infringement and reconcile its assertion of Crown title with Aboriginal title.

The court identified three aspects of Aboriginal title that must be considered in connection with infringement and justification:

- Aboriginal title encompasses the right to **exclusive use and occupation** of the land

- Aboriginal title encompasses **the right to choose to what uses the land can be put**, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples

- Lands held pursuant to Aboriginal title have an **inescapable economic component**.

Once the Crown has justified its infringement, it must take steps to reconcile its assertion of title with Aboriginal title. This can take a number of forms:

- In some instances, 'consultation' will be required, but in most cases, it will "substantially deeper than mere consultation" - in other words, a real and authentic role in land use management and allocation decisions. In other instances, First Nation **consent** will be required.

- If infringement can be justified, then compensation may be due. Acknowledging the **value** inherent in Aboriginal title lands and resources, the Court indicated that diminished rights would normally require "valuable consideration".

Thus the Supreme Court of Canada has recognized that Aboriginal title is a **real property right**, and that has a **value**.

Anglicrs Obligations

If we look over the written record of correspondence on this file, it is clear that the government of Quebec has not met its legal obligations in terms of consulting our people and carrying out its fiduciary obligations to protect our interests.

We object to attempts to characterize an information session put on by the proponent as having met the need to consult. We made this position clear at the time. And we reiterate it again today – having sat through a sales job from the proponent was a goodwill gesture on our part. It in no way was meant to alleviate the legal obligations of the Crown to ensure that fiduciary responsibilities had been met.

Failure to Provide English Language Documents

We see this failure most clearly in the refusal of the government, the proponent and Hydro Quebec to provide us with documents in English – which is the working language of the Council and the community at Timiskaming First Nation.

Back in November 2001 when BAPE was having hearings on the retrofit of the Des Quinze dams, Chief Daniel Chief wrote to Quebec requesting that the studies be given to us in English. Quebec refused.

With the Angliers development, both Long Point and Timiskaming wrote to the Minister of the Environment in March, requesting that the studies be made available in English. We never received a reply. On April 25, our lawyers wrote to the Minister once again requesting that materials be provided in English - no answer was given.

Our request to be able to access the documents relating to this project in the language of the community is not a request. It is not a stalling tactic, and it is not certainly not a favour that would be bestowed on us by your commission. Our ability to partake fully in these hearings through access to technical documents in a language we understand is a legal right. And it is a legal obligation of the Crown to ensure that we are able to participate.

As case law has shown it is not incumbent on the First Nations to prove the Crown failed in its obligations, but rather the obligation of the Crown to show how it has met these obligations.

The Angliers project is a $55 million development. Once built, it will provide millions of dollars every year in revenue. This is money that will be generated off Algonquin resources and no mention has been made of any revenue sharing benefits that will accrue to the people who hold original title to these lands.

Even more, despite the great wealth generated by this project, we have been told that there is no money to provide our people with documents in a language we can understand.

The Angliers project will provide clear benefits to the proponents, Hydro Quebec and the government, and yet, this government has left the people of Timiskaming First Nation to scramble out of our limited resource budget to provide whatever technical or legal advice we can manage to cobble together. This isn't good enough. We can't accept this.

Federal Obligations

The Angliers project has an inescapable Federal government component. This dam is a federal dam and its transfer to a private proponent or the province includes inescapable obligations to assess potential impacts on First Nations. The federal government has not undertaken these obligations and we are putting the federal government on notice that this project cannot go forward until our First Nation interests have been considered.

Willingness to Assert Title

Our history of accommodation with the settler population has not been a happy one. Since the time of European contact, we have been pushed to the very margins of life in this territory. As a result, we have been forced on a number of occasions over the last decade to assert our territorial rights.

In 1996, our Council was forced to occupy the Old Fort at Ville Marie after Parks Canada began

digging up an ancestral burial ground. This occupation would never have happened if Parks Canada officials had simply agreed to our desire to have input in the redevelopment of our ancient gathering site at Obadjiwan.

In the fall of 2000 our people had to blockade the Adams Mine road to stop the development of the Adams Mine dump proposal. This blockade was forced on us after years of being ignored by the government of Ontario over the issue of Aboriginal Title at this site.

In 2002 the Ontario government began pushing through with the licensing of the Bennett toxic waste incinerator at the edge of our traditional territory. We made it clear to the Ontario government that our right to be consulted would not be overlooked as it was at the Adams Mine. As a result, the Ontario government chose a different route and named Timiskaming First Nation, the Algonquin Nation Tribal Council and the Quebec-based Algonquin community of Abitibiwinni to its Government Review Team for the project.

I bring these examples forward today to show you that Timiskaming First Nation will act to protect its legal interests for the benefit of our future generations. As well, the examples show that there are ways to avoid conflict – if the Crown recognizes that it is better to work in partnership than in an adversarial position.

Next Steps

We realize that Angliers is just one of a series of projects that could take place on our territory in the coming years. What we have come to realize is that there never will be a convenient moment for the government to address our issues of title or accommodate our interests.

In light of this, we realize that the Angliers project will set a test case for future relations between our First Nation and the government of Quebec.

Therefore, we are calling on the BAPE Commission and the Government of Quebece to rectify the failings of this process and initiate a process where we can work together as partners to rectify the situation.

This partnership would begin by halting any further moves on this file until three remedial steps have been taken:

1) That the Commission authorize the proponent to provide us with technical documents in our language.

2) That the Commission or the government ensure that we are able to access financial resources to hire an independent review team to assess Angliers. We are calling for an immediate halt to this project until the government addresses our concerns. First, that we are supplied technical documents in the working language of the community. Secondly,

that we are provided the financial resources to conduct an independent review of the claims being put forward by the proponent.

3) The Government sit down and consult with our First Nation to establish a protocol that will ensure that co-operation, rather than conflict will mark the development of our region.

.The *Algonquin people wish to work as partners with our neighbours.* We wish to be part of the sustainable development of our region for the benefit of future generations. But we are not willing to accommodate a speedy approvals process which puts our rights and interests in jeopardy. We are not willing to be shunted aside by timelines which limit our voice to that of an 11th hour complaint.

We have lost too much over the last 200 years and we simply can't afford to lose any more. Megwitc

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